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IN THE

Supreme Court of the United States

NOVEMBER TERM, 1918.

No. 27, Original.

EX PARTE, IN THE MATTER OF THE APPLICATION

of

WILLIAM F. HUDGINGS for leave to file a petition for a Writ of Habeas Corpus.

1. **Motion for Leave to File Petition for Habeas Corpus.**
2. **Petition for Habeas Corpus.**
3. **Preliminary Brief.**

SPARKS, FULLER & STRICKER,
Attorneys for Petitioner,
Office & P. O. Address,
44 Court Street,
Borough of Brooklyn,
City of New York.

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Ex Parte, IN THE MATTER OF THE APPLICATION

of

WILLIAM F. HUDGINGS for leave to file a petition for a Writ of Habeas Corpus.

Motion for Leave to File Petition for Writ of Habeas Corpus.

Comes here now WILLIAM F. HUDGINGS, and moves the Honorable, the Judges of the Supreme Court of the United States for leave to file a petition for Writ of Habeas Corpus directed to James M. Power, United States Marshal for the Eastern District of New York, which petition is hereto annexed.

New York, November 16th, 1918.

WILLIAM F. HUDGINGS,
Petitioner,
by
SPARKS, FULLER & STRICKER,
Attorneys for Petitioner,
Office & P. O. Address,
44 Court Street,
Borough of Brooklyn,
City of New York.

JESSE FULLER, JR.,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES,

NOVEMBER TERM, 1918.

No. , Original.

Ex Parte, IN THE MATTER OF THE APPLICATION

of

WILLIAM F. HUDGINGS for leave to file a petition for a Writ of Habeas Corpus.

Your petitioner, WILLIAM F. HUDGINGS, of the Borough of Brooklyn, County of Kings, City and State of New York, humbly complaining, shows that he is unjustly and unlawfully detained and imprisoned by one James M. Power, United States Marshal for the Eastern District of New York, in the Mineola Jail, Mineola, Nassau County, New York. That your petitioner has so been restrained of his liberty since the 11th day of June, 1918, your petitioner having been first imprisoned in the City Prison, known as Raymond Street Jail, in Raymond Street, Borough of Brooklyn, City of New York, and having been transferred to said Mineola Jail, in Mineola, Nassau County, State of New York, on or about the 5th day of September, 1918.

That the facts and circumstances on which rested the order which is the cause or pretext of

said detention of your petitioner, which order is hereinafter set forth, are as follows:

The action of United States of America *vs.* Joseph F. Rutherford, William E. Van Amburgh, Robert J. Martin, Frederick H. Robison, George H. Fisher, Clayton J. Woodworth, A. Hugh MacMillan and Giovanni DeCecca, defendants, was on trial before the Hon. Harland B. Howe, District Judge of Vermont, sitting by designation and appointment in the District Court of the United States for the Eastern District of New York, and a jury, having commenced on or about the 5th day of June, 1918, and continued until the 20th day of June, 1918. That on the 11th day of June, 1918, your petitioner was recalled to the witness stand as a witness on behalf of the Government having previously testified during said trial as a witness on behalf of the Government, which former testimony was unrelated to the matter of which your petitioner now complains. That upon taking the witness stand your petitioner testified, as is set forth in the following extract taken from the minutes of the court stenographer:

"Brooklyn, New York, June 11, 1918.

The Court met pursuant to adjournment.

Present: The Court, counsel and jury as before.

Mr. Oeland: If your Honor please, I desire to reopen the case to introduce one piece of evidence that was overlooked.

The Court: You may.

Mr. Oeland: I ask that this paper be marked for identification.

The paper was marked Exhibit 31 for identification.

Mr. Oeland: And the pages are 140 to 148

inclusive and ask that they be marked for identification of this Court.

The pages referred to were marked Exhibit 32 for identification.

Mr. Fuller: What is that?

Mr. Oeland: It is a minute book.

WILLIAM F. HUDGINGS was recalled as a witness for the Government and testified as follows:

Direct-examination by Mr. Oeland:

Q. Do you know the signature of Mr. Van Amburgh? A. I have seen it many times.

Q. Do you know the signature of MacMillan? A. I have seen it also.

The Court: Have you seen him write?

The Witness: I won't say I have seen him write.

The Court: What is your best recollection as to whether you have seen him write?

The Witness: I think I have never seen him write.

The Court: Well, write anything—the signature or not?

The Witness: I have not watched that.

The Court: I did not ask you whether you ever saw them write, I want an answer yes or no.

The Witness: I said no.

Q. Have you seen letters that they have signed and handed out? A. I have seen checks they have signed themselves but not letters.

Q. You have seen checks they signed? A. Yes, sir.

Q. Is that right? A. Yes, sir.

The Court: You have been there how many years?

The Witness: About nine years.

The Court: Continuously.

The Witness: Yes, sir.

The Court: And both these gentlemen been there in that place of business nine years?

The Witness: Almost continuously, yes, sir.

The Court: And you tell us that you have never seen either of them write with a pen or pencil, never seen them in the act of writing?

The Witness: No, sir, I never stood over their shoulder.

The Court: I did not ask you where you stood. I asked during that nine years you tell us whether, upon your oath, that you never saw either of these gentlemen in the act of writing. That is what the Court asks you, sir.

The Witness: I do not remember that I ever saw either of these gentlemen in the act of writing.

The Court: What is your best recollection whether you ever did or not?

The Witness: That is my best recollection.

The Court: Tell us how your workshops or your different places where you do your work are located; how often are you in one another's presence?

The Witness: I am very little in Mr. Van Amburgh's presence. His office is separated by a partition. I am more frequently in Mr. MacMillan's presence, but not to see him do any writing.

The Court: And when you were in his presence, is he at his desk doing his work?

The Witness: Part of the time.

The Court: And during that entire nine years you never happened to see him in the act of writing?

The Witness: Not that I can now recall. That is my best recollection.

Q. I hand you Exhibit 31 for identification, and ask you if at any time—I will ask you if that is a facsimile, a mimeograph copy of the signatures of MacMillan and Van Amburgh? A. It looks very much like it.

Q. Didn't you ever see that around the office there; didn't mail out copies of that? A. I didn't mail out any copies of these, but I have seen this paper, I think I have seen something very similar to it.

Q. In whose hands did you see it? A. I do not know that I saw it in any one's hands. I have seen it laying there on some of the desks.

Q. Wasn't that discussed with you, that particular paper, the original of it, before those mimeographed copies were made? A. It was not discussed by me, but I have seen the paper.

Q. And you saw the original? A. I am not able to say that I saw the original.

Q. How many of those mimeographed copies have you seen? A. I have seen, I think, the stack of papers, probably an inch thick.

Q. Of which that is a copy? A. I think that is a copy.

Q. That is one of the original mimeographed? Now, isn't that the signatures of Van Amburgh and MacMillan, two of the signatures. I am not asking you about all of that. I mean a mimeographed copy of the original signatures of Van Amburgh and MacMillan?

A. It looks like the handwriting of Mr Van Amburgh and Mr. MacMillan.

Q. Is that the best you can say about it? A. That is the best I can say.

Q. Will you say it is not a mimeographed copy of their signature? A. No, I would not say that.

Q. Will you say it is a mimeographed copy of their signatures? A. No, I would not say that.

The Court: Why not?

The Witness: I can only say it looks like their writing. That may be a forgery for all I know. I did not see them write it.

Q. Do you think you would have so many copies of forged instruments around there? Where did you see these copies? A. On one of the desks, I do not remember which desk it was.

Q. Whose desk was it? A. I cannot recall.

Q. Whereabouts was it? A. At the office of 17 Hicks Street.

Q. When did you see them? A. It is July 17. I would therefore suppose that it was in July, 1917.

Q. And you saw them around the office there in a stack? A. Yes, sir.

Q. Who does the mimeographing there? A. I do not know.

Q. Did you ever see any mimeographing done there? A. I have.

Q. You have a machine for that purpose? A. No, we had no mimeograph in 1917 that I recall. This was probably printed by some other process.

Q. Do you know anybody around there that writes as near Van Amberg and MacMillan as that signature? A. No, I do not.

Q. What made you say it might be a forgery?

Mr. Sparks: I object to that.
The Court: It is admitted.
Mr. Sparks: Exception.

A. Because it would be very possible to produce a forgery here.

Q. You say that is a copy of an original of the mimeograph around the office there? A. Yes, sir, I haven't read it through but the general appearance looks to be the same as I saw in the office at 17 Hicks Street.

The Court: You ask him whether he knows anyone around that office that did see any of these gentlemen write.

Q. Well, can you tell us anybody around there that did see them write? A. No, I cannot.

Q. They did not go off and do it in secret, did they? A. I don't know.

The Court: Now are you serious in your answer that you have just given that you don't know whether they went off and did their writing in secret. Are you serious about that, young man?
The Witness: I am very serious.

Q. Did you ever take a check from Van Amberg and go have it countersigned by MacMillan? A. I think so.

The Court: Why did you say you think?
The Witness: I say I think because I want to make truthful answers here.
The Court: Is that the real reason why you used the word "think"?

The Witness: That is the real reason.

The Court: Now, Judge Oeland, the greatest latitude will be allowed the Government in asking questions of this witness. You may take as much time as you like.

Q. How many times have you seen them write checks—let me go at it this way. Van Amberg has handed you a check with his signature on it, hasn't he? A. Yes, sir.

Q. How many times? A. I could not say, that has occurred several times.

Q. Well, what would you do with it? You have taken those checks to MacMillan asked him to countersign them? A. I have on a few occasions.

Q. And when he handed it back to you it would have his signature as countersigned upon it in the corner? A. No, I would take it to his desk and leave it there, and as soon as it was signed it would, in the usual course of business come to my desk probably.

Q. What did you take it to his desk for? A. If it was anything in a particular hurry I would sometimes ask that it be put ahead of the regular business.

Q. Haven't you stood there and waited until he handed it back to you? A. I do not recall that had occurred. It might have occurred.

Q. Well, he would hand you back the checks countersigned with his name, is that right? A. Yes, sir.

Q. Well, you had no reason to believe those were forged, did you? A. No, sir.

Q. And you have seen those signatures on the Van Amberg checks that you took to him for countersigning; they have come back countersigned by him? A. Yes, sir.

The Court: How could he sign a check under those circumstances without your seeing him do it?

The Witness: He could not if I stood there and watched him do it.

The Court: You didn't do it.

The Witness: I just answered that I do not recall ever having done it.

The Court: I did not ask you, sir, what you just answered. I will let you proceed.

Q. What is your recollection now as to what happened and how many times it happened that you took a check there? A. I suppose that occurred twenty or twenty-five times.

The Court: Not more than three times a year? You say you have been there nine years and you have been there nine years and you say twenty or twenty-five times and that would be a little over twice a year.

The Witness: I do not think Mr. MacMillan has been signing checks for over a year or such a matter.

The Court: What do you mean "such a matter".

The Witness: I mean a year or two years.

The Court: Or two years.

The Witness: Possibly two years, I do not recall.

The Court: Then that would not be very often. There are a great many checks signed in the course of a month, are there not?

The Witness: Yes, sir.

Q. You say you have seen him then, in the course of a year or a year and a half, you

have taken checks signed by Van Amberg—where would you get Van Amberg's checks? A. From Mr. Van Amberg's department.

Q. Would he hand them to you? A. I think he has handed them to me personally on some occasions, and most generally his assistant.

Q. Well, you looked on the signatures on the checks he handed to you? A. Sometimes I would and sometimes I would not; just to see whether it was signed.

The Court: Do you know anyone there that has seen either of these gentlemen write or who would be likely to see them write?

The Witness: Mr. Van Amberg's assistant, probably.

Q. Who is he? A. Mrs. Meyers.

Q. Where is Mrs. Meyers? A. I do not know where she is.

Q. When did you see her last? A. A day or two ago.

Q. Where? A. At 122 Columbia Heights.

Q. Well, is she still there? A. I presume she is at 17 Hicks Street where she usually works every day.

Q. Well, did you see her this morning? A. I did not.

Q. Did you see her yesterday morning? A. No, I do not think I saw her yesterday morning.

Q. Have you seen her since Wednesday of last week? A. I think so.

Q. Where? A. In the dining room at 122 Columbia Heights.

Q. Now, you had no reason to think that these Van Amberg checks had been forged by somebody when they were handed to you by him? A. No, I did not.

Q. Now, the signatures that you saw there and looking at that mimeographed signature there, is it your opinion that is Van Amberg's signature? A. It looks like Mr. Van Amberg's signature.

Q. Well, what is your best opinion of it? A. That would be my best opinion, but I might be mistaken.

Q. Oh, we are all liable to be mistaken, but what is your best opinion that this copy is a copy of his signature on a mimeograph? A. That is my best answer.

Q. You would not mind taking a check with that signature on it as genuine?

Mr. Sparks: I object to the form of the question.

The Court: Yes. I am inclined to exclude that question.

Mr. Oeland: The question is withdrawn.

Q. You have taken those checks signed by Van Amberg to MacMillan and you have received back the check countersigned by MacMillan? A. Yes, sir.

Q. Looking at the mimeographed signatures what is your best opinion as to whether or not that is MacMillan's signature? A. It looks very much like Mr. MacMillan's signature.

Q. What is your best opinion? A. That would be my best opinion, but I might be mistaken.

Mr. Sparks: I ask the Court in view of the fact that we have sat silent here under this examination of this witness, that is no part of counsel's duty to suggest to any witness under examination under the latitude that your Honor

allowed the Government to cross examine, to suggest or make any objections under the circumstances and that his failure to recollect shall in nowise be taken as against—that they shall assume no hostile attiude as against the defendants for that reason.

The Court: The requested instruction is denied.

Mr. Sparks: Exception.

The Court: I do not propose to stop and instruct the jury every two minutes, and at the request of the Court I think that counsel for the Government should ask this witness more about the opportunities and probabilities of his seeing this person write. It is a very extraordinary situation here. Very extraordinary testimony. It is very improbable.

Q. What part of the work does Mr. MacMillan do? A. He oversees the work in a general way of the office of 17 Hicks Street. He dictates some letters.

Q. Have you seen him dictating letters? A. Yes, sir.

Q. Have you seen the letters after he has signed them? A. I do not recall that I ever saw any of his letters after he dictated them.

Q. You do not recall ever seeing any letters sent out by him? A. I do not.

Q. What part of the work do you do? A. I am the printing clerk and looking after the clerical end of the printing for the society.

Q. Don't you frequently have printed matter that is prepared by MacMillan or Van Amberg? A. Yes.

Q. Don't Van Amberg get up something like a yearly statement? A. But it is usually

typewritten. There is no manuscript about it. His handwriting.

The Court: Does he have pen and ink on his desk? Do you know about that?

The Witness: I am quite sure that he did. Everybody does.

The Court: Have you seen pen and ink there and pencil?

The Witness: Yes, all of that.

The Court: Now, ask him more about how often he is in there and what the occasions are why he goes there.

Q. What occasion have you to go to Mr. Van Amberg's office? A. I am probably in Mr. Van Amberg's office about once in two months.

Q. Are you in the same building with him? A. Yes, sir.

The Court: Now, Mr. Witness, you do not mean that you have seen him write his signature? Have you ever seen him in the act of writing with a pen, pencil or whatever the writing may be or the signing of his name or writing anything else, writing in a book on any kind of book or paper or other material? Now, the question is whether you have ever seen him in the act of writing, not how much or how little, but whether you have ever seen him in the act of writing. That is the question this Court wants you to answer.

The Witness: I cannot answer yes unless I knew it was a correct answer. Therefore I cannot answer yes to that question.

The Court: Did you know him before you went there to work?

The Witness: No, sir.

The Court: So your acquaintance extends for a period of nine years?

The Witness: Yes, sir.

The Court: Did you go away on trips with him?

The Witness: No, sir, not with him.

The Court: Or in his company?

The Witness: No, sir, that has probably occurred during the nine years.

The Court: Been at hotels together?

The Witness: During conventions I think that has occurred.

The Court: Why do you say "think," don't you remember about that?

The Witness: I do not recall that I have ever put up at hotels with Mr. Van Amberg, but I would not say that I have not, because we have many conventions.

Q. Have you traveled on the train with him? A. Yes, I have traveled on the trains with the conventions.

Q. Have you seen him sign his signature on the hotel register? A. No, I never saw that.

Q. Where did you stop when you went to these conventions; you all stop at the same place, don't you? A. No, not always.

Q. Did you some times? A. If the convention is a large one all the hotels in the city are full and we stay at different places.

Q. Did you ever look at Van Amberg's books at any time; did you look to see what the entries are made for? A. I have never looked at Mr. Van Amberg's books that I remember.

Q. How about MacMillan? How long has he been working there? A. He has been there off and on for the past eight or nine years. Not the greater part of that time,

however, most of the time he has been out traveling.

Q. He was the assistant to Mr. Russell before his death? A. For a short period before his death.

The Court: Which is the defendant, Mr. MacMillan?

(The defendant MacMillan is pointed out to the Court.)

Q. What work did he do in Mr. Russel's lifetime while he was there? A. He had general charge of the office under Pastor Russell.

Q. Well, you were there in the same building with him? A. Yes, sir.

Q. Living at the same house with him? A. Yes, sir.

Q. See him three or four times a day; at meal times? A. Yes, when he was there and I was there.

Q. You have seen him at his desk? A. Yes, sir.

Q. Where was his desk with reference to your desk? A. It was in the same office, not a great distance apart.

The Court: The same room?

The Witness: Yes, sir.

The Court: Your desk is in the same room his desk is in?

The Witness: It is a very large room, about twenty or thirty desks.

The Court: It is not so large but what you could see across it?

The Witness: No, sir.

Q. How far was your desk away from MacMillan's? A. About ten feet, I think.

Q. Anything intervening between you and MacMillan? A. No, sir.

Q. You could see him sitting at his desk? A. My desk for the greater part has been with my back to Mr. MacMillan's desk, but recently it has been turned so it is alongside. That is, my side is toward Mr. MacMillan's desk, a little in front.

Q. How far away from him? A. About ten feet.

Q. And you have been there within ten feet of him for a year and a half? I guess it is about that long.

Q. And you have never seen him writing with his pen?

The Court (interposed): Or pencil?

The Witness: I cannot say that I can recall that I have ever seen him in the act of writing. I would not say I have not, but I would not say that I have.

The Court (addressing the clerk): Have you any forms here committing a witness for contempt? Well, you direct the clerk to get up the commitment papers. This witness is going to be committed for contempt of court. The Court is thoroughly satisfied, Mr. Witness, that you are testifying falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witnesses, especially with your wife. I believe—is that right Mr. Judge Oeland?

Mr. Oeland: Yes, she was one of the witnesses.

The Court: And it becomes the plain duty of the Court to commit you to jail, sir, for contempt, and before doing so, I think it is the duty of the Court to explain

to you that the answer, "I do not remember of ever having seen him write," is just as false, is just as much contempt of court if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, "I do not remember." Now, we will adjourn here for a few moments. The Court desires you to have every opportunity to correct your answers if you so desire to do so, and the Court suggests that it would be very proper for you to talk with a lawyer about the situation. Counsel for the defense or counsel for the Government or anyone else you may desire to, but I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this Court and I am very sure it has, to deal with you in the manner proposed, I am going to do it. Now, a good many times a lay witness comes into the court with the notion that if they say they do not remember that that is a complete answer. I desire to inform you that that is not a complete answer when the fact is that you do rermember or the fact is that you could not fail to remember. Now, we will take a recess for about ten minutes.

The Witness: Would it be proper for me to make a statement?

The Court: You may make a statement, but it would be more prudent, I think, after you confer with someone, because you evidently have a wrong notion of this situation. Now it is the duty of the Court to be indulgent with you and considerate with you and give you every

opportunity to do right. I would not like to have you, or anyone else think for a moment that that course will not be taken up. You see the situation is a very remarkable one, Mr. Witness, in having a desk in the same room with a man for so long and transacting so much business with him, and being present when so much business has been transacted by him. The answer that you do not remember of ever seeing him write, would be, in the opinion of the Court, impossible, and when I say "impossible," that is a strong word, but the situation is so remarkable that I feel very sure that I am justified in that. Now, you are the third witness who has taken this course. Is it the fourth witness, Mr. District Attorney?

Mr. Oeland: This is the third witness, your Honor, and the Italian witness.

The Court: Well, the Italian witness is not very well to be classed with him, I think.

Mr. Oeland: No, I would not stick to it.

The Court: And the Court has sat here several days listening to this and it becomes the plain duty of the Court to commit you for contempt and deal with you otherwise, if necessary.

Mr. Sparks: Before the recess I would like to make an objection.

The Court: Yes. But this is dealing with the witness.

Mr. Sparks: I understand, but I have the right at any stage of the case to make a motion such as I am going to make.

The Court: Well, we will hear you.

Mr. Sparks: In view of the fact that this has occurred at least three times during the trial of this case, and the Court has expressed its opinion as to the truthfullness of the witnesses, the witness in each case claiming that they or she were doing the best they could to answer the questions put to them, in view of the fact that they could not state and answer the question from their own knowledge, and in view of the fact that the Court has without any doubt indicated to the jury this witness was telling an untruth, and in each case telling them that unless they modify their testimony after an adjournment, I feel that these various occurrences have resulted in great prejudice to the defendants, and cannot help but affect the jury in their deliberations upon this case when it finally goes to them, especially in view of the fact that these three witnesses are members of the same organization, that that will have its effect unconsciously and there is nothing that the Court can say to them, in view of these various occasions, which will eradicate this impression from their minds. I also object upon the ground that these witnesses have been called by the Government itself, and the Government is in no better position to impeach their own witnesses than any plaintiff or party in any civil suit, and this impeaching of the witness by the Government, is contrary to all the known rules of precedure on the question of impeachment, and we respectfully ask, in view of all the facts, to withdraw a juror.

The Court: To what?

Mr. Sparks: To withdraw a juror.

The Court: Well, the motion is denied.

Mr. Sparks: I take an exception.

The Court: And in denying the motion the Court desires to say that this is not an extraordinary procedure in the least. Nothing has been done to violate the rules as to the impeachment of witnesses. The Court has a right to express its opinion in the circumstances of the present situation. If the Court fails to do so, it would not do its duty. The Court has even a right to express its opinion as to the way the verdict should go in a case in this court. I never exercised that right, and if the course suggested by the counsel for the defendants was the proper course to pursue, then in any trial the Government could be defeated or in civil suit a plaintiff, or defendant might be defeated in his case or in his defense, because a witness comes in and says "I do not remember," would be unable to proceed and complete the trial of any case. That would be giving a witness or witnesses the power to stop all proceedings in court. And as is said in this motion, gentlemen, as to prejudicing you against the defendants, there is no evidence in the case that any of these defendants are responsible for this witness's testimony. There is no evidence in the case to justify you in drawing the inference that any of these defendants are responsible for the attitude taken by the witness, so you should not draw any inference against the defendants. The young man on the stand is a witness called by the Government. Whatever

their relations may be, as appears by the testimony, would not warrant the Court or the jury in charging this up, so to speak, to the defendants, or any of them, so you should be very careful not to let the conduct and the testimony of the witness in the respect indicated work any harm against any of the defendants. Now, before we take our recess, Judge Oeland, I wish you would ask him how long they have had their desks in the same room. I understood him to say one time more than a year and a half.

Mr. Oeland: That is the way I understood him.

The Court: I understood him another time to say a year and a half.

Mr. Sparks: Nothing in the Court's remark in reference to my motion can be deemed by me to have cured the situation which I assume to exist.

The Court: Not in the least. The motion is denied, and what the court said is in explanation of the ruling it made in denying the motion.

By Mr. Oeland:

Q. How long have you been within ten feet —your desk being within ten feet of Mr. MacMillan's? A. About a year and a half.

The Court: How long has your desk been in the same room with Mr. MacMillan's?

The Witness: About a year and a half.

The Court: Before this year and a half did you occupy different rooms or workshops?

The Witness: He was not there, he had no desk.

The Court: What kind of a desk do you work at, whether roll top or flat top?

The Witness: Roll top.

The Court: And what kind of a desk does Mr. MacMillan work at, whether roll top or flat top?

The Witness: Roll top when he is there.

The Court: I did not ask you when he was there. Are there any other desks in this room?

The Witness: Yes, sir, about thirty.

The Court: About thirty desks?

The Witness: Yes, sir.

Q. You go to the place of work with him in the morning? A. Very seldom.

Q. You both stay at the same place? A. The same place.

Q. And go there at the same time in the morning? A. No, not very often.

Q. Well, did you see him there during the daytime or did you see him at noon? A. He is in and out.

Q. Is he in every afternoon? A. Part of the time.

Q. And did you talk with him in the office? A. Part of the time.

Q. Don't you talk with him every day that he is there pretty nearly, don't you? A. We have some relationship, yes, sir, every day.

Q. You go and visit at his desk about matters, getting information as to what he wants done, he being the general manager? A. Sometimes.

The Court: Is not that often?

The Witness: Yes, I might explain that Mr. MacMillan has very little work at his desk. His work is mostly over-

seeing and going back and forth between the Brooklyn Tabernacle and Bethel. I could not at the present moment say that I have seen pen and ink on his desk.

The Court: You said a little while ago that you had.

The Witness: I had in mind Mr. Van Amburgh, and I could not say that I have not seen pen and ink on Mr. MacMillan's desk, but I could not say that I have either.

Q. But in the year and a half there you say you were within ten feet of him, and you do not know that you ever saw pen and ink at his desk? A. His desk is within ten feet and he is there very little of that time.

Q. Is there once a week? A. Yes, he is there practically every day in and out. He does some work at that desk.

The Court: He does some work at that desk?

The Witness: He dictates there, and when he is through he will close his desk down and go away.

Q. Don't he sign letters there? A. I suppose he does.

Q. Have you ever seen him signing letters there in the year and a half? A. I cannot recall it. My back is to him most of the time.

Q. When did you turn your face towards him? A. When he would get out of his seat and walk over there for something.

Q. When you walked over there did you see him transact any business with pen and ink? A. I cannot recall it.

Q. He did not just sit there and do nothing? A. He would be reading and looking over papers; something like that.

Q. And you never saw him take a pencil and O. K. this order or that order that would come in the office? A. I do not remember that ever having occurred.

Q. Well, do orders that come into the office go to his desk for instructions? A. No, that would not be the usual course of business.

Q. Don't mail come to his desk that is sent from there to other desks to be answered? A. No, sir, all letters don't go to his desk. Very few, it is my recollection.

The Court: Well, you have been away attending these meetings and conventions, have you dined with him?

The Witness: On some occasions.

The Court: In a dining car?

The Witness: No, I do not think we have been in a dining car together.

The Court: In hotels?

The Witness: I think we have been in a hotel together, but not in the same room.

The Court: Never dined with him in a hotel on the European plan—in a restaurant where you make out—or a railway dining car— where you make out a schedule of the things to be served. Did you see him write?

The Witness: I think not.

The Court: Does he carry a little pocket memorandum book?

The Witness: I could not say.

The Court: Did you ever see him write in that?

The Witness: I do not know that he carries one.

The Court: You cannot tell about that?

The Witness: No, sir.

The Court: Tell the Court whether you

care to take any further time on this matter, do you?

The Witness: My time is your time.

The Court: I suggest that you might confer with counsel.

The Witness: No, sir, my answers will be exactly as they have been.

The Court: Very well. You are adjudged to be in contempt of this Court and you are ordered to be committed to jail forthwith. Mr. Clerk, you prepare the commitments. You are in the custody of the marshall from now on. And you may call the next witness."

That thereupon deponent was taken into custody by said James M. Power, Marshal for said Court, and in the afternoon of said day, was brought before said Hon Harland B. Howe who called upon your petitioner to plead to an indictment charging him with perjury which had been handed down by the Grand Jury for said district during the day. That your petitioner pleaded not guilty to the charges of said indictment and was thereafter duly admitted to bail upon said charge but was continuously thereafter kept in custody by said James M. Power pursuant to the direction of the Hon. Harland B. Howe. That thereafter, as petitioner is informed by his counsel, an order was filed in the office of the clerk of the Uniter States District Court for the Eastern District of New York, on the 8th day of July, 1918 nuc pro tunc as of the 11th day of June, 1918, a copy of which order is as follows:

"In the District Court of the United States of America for the Eastern District of New York.

In the Matter of Contempt of William F. Hudgings.

In open Court.

WHEREAS, on the eleventh day of June nineteen hundred and eighteen in open court, and in the presence of the District Judge holding the United States District Court for the Eastern District of New York, to wit: Hon. Harland B. Howe, during the session of said court, and while said court was engaged in its regular business hearing a certain cause, to wit: the cause of the United States of America against Joseph F. Rutherford and others then pending before said court one William F. Hudgings was guilty of misbehavior in the presence and hearing of said court in that being upon the witness stand and having been duly sworn as a witness in said cause on behalf of the United States, he, the said William F. Hudgings did wilfully refuse to answer certain questions truthfully and fully then and there properly and duly propounded to him as such witness and did then and there falsely swear that he could not recall ever having seen either one William E. Van Amburgh or one A. Hugh MacMillan in the act of writing, and likewise did then and there falsely swear that he did not remember that he ever saw either said Van Amburgh or said MacMillan in the act of writing, and

WHEREAS the said William F. Hudgings in so answering and so refusing to answer was guilty of a contempt of this Court, and of the authority of this court by misbehavior in its presence,

NOW THEREFORE, BE IT ORDERED AND ADJUDGED by this Court that the said William F. Hudgings by reason of said misbehavior was, and

is, guilty of contempt of this Court, committed in its presence on the eleventh day of June, nineteen hundred and eighteen, and it is

FURTHER ORDERED that for said contempt the said William F. Hudgings be committed to jail until he shall purge himself of said contempt or be discharged according to law.

Dated at Brooklyn in the Eastern District of New York, this 11th day of June, 1918.

HARLAND B. HOWE,
United States District Judge."

That said order is endorsed as follows:

"Criminal 2656

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

In the Matter of the Contempt

of

WILLIAM F. HUDGINGS

ORDER COMMITTING WILLAM F. HUDGINGS TO JAIL.

MELVILLE J. FRANCE,
U. S. Attorney,
Eastern District of New York,
Federal Building,
Brooklyn, N. Y.

Filed July 8, 1918, nunc pro tunc as of the 11th day of June, 1918."

Your petitioner further alleges that your petitioner truthfully answered all the questions put to him by Court and counsel during the course of his said testimony to the best of his ability and to the best of his knowledge, and to the best of his recollection, and that it nowhere appears in said testimony that your petitioner failed to answer fully and accurately each question asked of your petitioner and that it nowhere appears in the course of the testimony of your petitioner, or any of the testimony given on said trial up to the time of the direction that your petitioner be committed, that the MacMillan referred to in said testimony had ever written at the desk set apart for him, except for the occasional countersigning of checks, or that your petitioner was ever present when said MacMillan did write, if at any time he did write at said desk, or elsewhere, or that your petitioner had ever observed said MacMillan in the act of writing either at said desk or elsewhere in the presence of your petitioner, or that your petitioner was ever present when said Van Amburgh was engaged in writing or had ever observed said Van Amburgh in the act of writing, nor did it appear by any of the evidence taken during said trial that the answers of your petitioner to the said questions asked him were other than full, complete and truthful answers to such questions.

Your petitioner therefore alleges that the only offense committed by your petitioner was that the testimony given by your petitioner was in conflict with the opinion entertained by the Hon. Harland B. Howe, the trial judge, as to what said testimony should be. Your petitioner further alleges, therefore, that the order adjudging your

petitioner in contempt of court is void and was made without any jurisdiction in the court to make, file or enter said order and that your petitioner is being deprived of his liberty without any lawful warrant or authority whatsoever and has been continuously since said 11th day of June, 1918, in violation of the Constitution of the United States, and especially the Fifth Article of Amendment thereof, and of the laws of the United States.

WHEREFORE your petitioner prays that a writ of habeas corpus be issued by this honorable court directed to said James M. Power, United States Marshal as aforesaid, and that the matters and things herein contained be inquired of by the Court and that your petitioner be ordered discharged from the detention and imprisonment aforesaid.

AND your petitioner will ever pray.

Dated, November 16th, 1918.

WILLIAM F. HUDGINGS,
Petitioner.

State of New York,
City of New York,
County of Kings, } ss.:

WILLIAM F. HUDGINGS, being first duly sworn, deposes and says that he is the person named in and whose name is subscribed to the foregoing petition. That he has read and is familiar with and knows the contents of said petition; and that the matters thereof and things therein contained are true in substance and in fact.

WILLIAM F. HUDGINGS.

Subscribed and sworn to before me
this 16th day of November, 1918.

SELMA J. SPANDAU,
Commissioner of Deeds
for the City of New York,
Residing in the Borough of Brooklyn.

Kings County Reg. No. 9075, Kings County Clerk's No. 177-A.

N. Y. County Reg. No. 19110, N. Y. County Clerk's No. 295.

Term expires June 12, 1919.

IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1918.

No. , Original.

EX PARTE IN THE MATTER OF THE APPLICATION

of

WILLIAM F. HUDGINGS for leave to file a petition for a writ of Habeas Corpus.

PRELIMINARY BRIEF.

The question at issue is: Has the United States District Court, or a Judge thereof, jurisdiction to determine, where a witness, asked if he has had at some former time, a specified, visually received experience, replies that he does not remember, that such a reply is a refusal to answer and a false answer, and, by reason of such determination, to adjudge him in contempt of court and order him committed to jail until he shall purge himself of such contempt or be discharged according to law.

POINT ONE.

The Court was without authority summarily to determine that the answer was a false answer or a refusal to answer, and to adjudge the witness in contempt of court for giving such answer.

The pertinent statutory regulation is section 268 of the Judicial Code:

> "(Power to administer oaths and punish contempts.) The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts" (36 Stat. L. 1163).

This statute is held in *ex parte Robinson*, 19 Wallace (post) controlling upon the District Court, conferring upon them the power only (1) to insure order and decorum in their presence, (2) to secure faithfulness on the part of their officers in their official transactions, and (3) to enforce obedience to their lawful orders, judgments and processes. False or evasive testimony by a witness could, therefore, come within this statute only as being "disobedience * * * by any

* * * witness * * * to any lawful * * * command of the said courts."

It is not questioned here that an indictment for perjury may be based upon the testimony of a witness that he does not remember a material fact, when it is shown by competent proof that he does remember. This was held in *People* vs. *Doody* (*post*), 172 N. Y. 165. The difficulty is, as there pointed out, to establish by competent proof that he did remember the fact. Neither is it questioned that the answer "I do not remember" may, under exceptional circumstances, be so palpably false as to constitute in effect, a defiance of the court, a challenge to its authority to require an answer, and thus, by reason of the palpable falsity, yield the jurisdictional fact essential to the power to punish for contempt. When palpable falsity is missing, whatever the truth of the testimony may ultimately prove to have been, there is no difiance of the court, no challenge to its authority—no contempt. In *Peo.* vs. *Stone*, 181 Ill. App. 475, where an order, adjudging a witness in contempt as having testified falsely, was reversed, it is stated that the court may "act upon that of which it can take judicial notice, but it cannot judicially know that evidence is false, unless at the trial it is so made to appear by the witness' own admission, or perhaps by unquestioned or incontrovertible evidence" (p. 477). In the case at bar the witness testified with respect to one MacMillan: "I cannot say that I can recall that I have ever seen him in the act of writing. I would not say I have not, but I would not say I have." The untruthfulness of this answer could not be judicially known, nor did it appear by any evidence whatever. Nor could any inference be drawn as

to the untruthfulness of the answer. The fact testified to by the witness was subjective, a mental state,—inability to remember or call to mind a possible former experience,—and it is the fact of this mental state which the court below has held to have been testified to falsely. The court below has drawn the inference that the mental state was otherwise,—apparently that the witness could recall having seen MacMillan write. But the fact that the witness had seen MacMillan write does not appear. This is a fact independent of the witness' state of mind at the moment of testifying. It is a possible occurrence, perhaps long ante-dating the trial. But it does not appear in the testimony. This fact comprised of the original experience, memory of which was the immediate subject of testimony, is an inference drawn from the associations of the two men in their work, with desks in the same room, and drawn not immediately from those associations, but from the inference that MacMillan must at some time have written in the presence of the witness. Such a chain of inference is wholly unwarranted as a basis for a finding of fact or a conclusion of law. Facts upon which an inference may rest must be established by direct evidence as if they were the very facts in issue. An inference cannot be based upon an inference. *U. S.* vs. *Ross*, 92 U. S. 281, at page 283. In *People* vs. *Doody* (*post*) above referred to, the evidence disclosed the primary fact the state of the witness' memory, within two or three days of the moment when he testified.

Whether the witness here was entitled to the common law presumption of innocence with its strict requirement of proof for conviction (*Garrigan* vs. *U. S.* [C. C. A. 7th Circuit, 198], 163 Fed.

16, 22), and whether the element of willful falsity as criminal intent must be proved by evidence, or circumstances warranting an inference of the necessary facts, and beyond a reasonable doubt, (*Salem* vs. *Fogarty*, 70 Fed. 482, at page 485; *U. S.* vs. *Jose*, 63 Fed. 951, at page 954; *U. S.* vs. *Carroll*, 147 Fed. 947, at page 952; in *Re Cashman*, 168 Fed. 1008; *Gompers* vs. *Bucks Stove, etc., Co.*, 221 U. S. 418, at page 432); or whether more latitude of determination be allowed the trial court, it is submitted that the record shows affirmatively that every question was answered, and that the court below was utterly unable to know, regardless of what it may have elected to believe, that any answer was other than an absolutely truthful answer.

The palpable falsity needful to such manifest refusal to answer as to constitute disobedience of the command of the court, for which alone the court is empowered by the statute (Jud. Code, sec. 268, *supra*) to punish for contempt, is wholly absent. Nor is there any such palpable falsity disclosed by the testimony as to constitute such defiance of the authority of the court as may, under the broader common law rule, empower the court to vindicate itself by punishing for contempt. The case of *Ex parte Creasy*, 243 Mo. 677[9] (*post*) is on all fours with the case at bar, and convincingly supports the proposition embodied in the first point here discussed, and the second point now to be considered.

The case of *People* vs. *Doody* and *Ex Parte Robinson*, cited *supra*, are more fully presented below. The case of *Ex Parte Creasy* is given at the end of point two.

In *People* vs. *Doody*, 172 N. Y. 165 (1902) it was

held that a person may be lawfully indicted and convicted of perjury upon a charge of having falsely sworn that he did not remember. In that case, defendant swore on March 14, 1898, before a grand jury, to his recollection of a certain state of facts, and in May, 1898, he swore to said recollection upon the trial of one Fielding, who was thereupon convicted of conspiracy. Again in April, 1899 ,he aswore to the same recollection upon the trial of certain other persons. The judgment of conviction against said Fielding having been reversed in the New York Court of Appeals, said Fielding was again brought to trial on the 19th day of December, 1899. Two or three days before this second trial, the district attorney called Doody before him, read his former testimony to him and Doody stated that his recollection continued to be as testified to on the former trials. When Doody, however, was called as a witness he testified in answer to all of the questions upon matters which he had clearly remembered on the previous trials, that he did not then remember; and the trial broke down and Fielding was acquitted. In sustaining the proposition that a person could be convicted of perjury upon falsely testifying that he does not remember, the court says, at page 172:

> "In order to sustain the charge of willful and corrupt perjury against the defendant the prosecution was bound to prove to the satisfaction of the jury that the defendant did remember that he had made the corrupt and fraudulent agreement with Fielding, " * * *

and points out the circumstances above set forth as sufficient to enable a jury to determine whether

or not the answers were willfully and corruptly false. And at page 173 the opinion reads as follows:

> "We have no doubt that a charge of perjury may be based upon the testimony of a witness upon a judicial trial who has shown that he did not remember the facts material to the inquiry, if it be shown by competent proof that he did remember them. It may be difficult to prove the charge in many cases, but in this case there was no lack of proof. A witness may commit perjury by falsely stating what he thought or what he did or did not remember, or what his opinion is when these matters become material to the issue. It may be difficult to prove that his thought or his memory or his opinion was otherwise, but that difficulty has been successfully met and overcome in this case."

In *Ex Parte Robinson*, 19 Wallace (86 U. S.) 505 (1873), where an attorney was declared in contempt for language used in the presence of the court and his name stricken from the roll of attorneys, in his opinion granting a writ of mandamus for his reinstatement brought by the attorney, Justice Field said:

> "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has

been limited and defined by the act of Congress of March 2d, 1831. The Act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the constitution, may perhaps be a matter of doubt. But that it applies to the circuit and district courts there can be no question. These courts were created by Act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The Act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the courts. As thus seen the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes.

POINT TWO.

Habeas corpus is the proper remedy.

In *Ex Parte Fiske*, 113 U. S. 713, it is said at page 718:

> "There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error, or appeal to this Court."

Whether or not, a right of appeal exists, it seems clear that the power of the court to act through its writ to relieve from unlawful imprisonment, cannot be pared down by the existence of such alternative remedy. It is submitted that denial of the power to grant the writ in a case such as that at bar, would imply the existence of a power in the court summarily to imprison any person sworn as a witness before it.

The rule as to the finality of a finding embodied in an order where the facts upon which such finding depends lie peculiarly within the special and personal knowledge of the court making the order, as an assault committed in the court's presence, does not apply to the case at bar. Here the entire state of facts from which the order proceeded, and on which rest its findings and adjudication, are officially recorded as a part, or a register, of the proceedings, and the record is available for examination.

In *Noble* vs. *Union River Logging R. R.*, 147 U. S. 165, it is said, at page 173:

> "It is true that in every proceediing of a judicial nature, there are one or more facts

> which are strictly jurisdictional, the existence of which is necessary to the proceedings, and without which the action of the court is a mere nullity; * * *."

In the case at bar, as was said by Judge Taft in *Ex Parte Irvine* (*post*) "the jurisdiction of the court with reference to the witness is distinct from, though it grows out of, the jurisdiction to try the indictment." Since the facts on which the jurisdiction of the court depended can be definitely ascertained by a mere reference to the record, and the prima facie validity or wholly void character of the order and consequent imprisonment thereupon finally determined, habeas corpus is the proper remedy. And the testimony passed upon by the court, must appear to be false on the face of the record, for its falsity is a jurisdictional fact.

> *Ex parte Irvine*, 74 Fed. Rep. 954 (*post*),
> *In re Counselman*, 142 U. S. 547,
> *Ex parte Fiske*, 113 U. S. 713 (*post*),
> *Ex parte Creasy*, 243 Mo. 679 (*post*).

The cases relied on to support the foregoing argument upon point two are as follows:

In *Ex parte Creasy*, 243 Mo. 679, where a witness before the grand jury, in reply to questions whether at a certain hour and place, he had bought whiskey, answers, "I could not say; possibly I did" and persists in these answers when the court instructs him to answer "yes" or "no", he is not guilty of contempt of court in so answering. And habeas corpus is the proper remedy with which to attack the validity of an order, pursuant to which he is imprisoned, adjudging him in contempt. On the return to the writ, the Supreme Court will

go behind the recitals in the order of commitment and ascertain if the facts amount to a contempt. For the writ will be sustained not only for want of jurisdiction in the court below (1) over the person, and (2) over the subject matter, but also (3) in the particular case if the facts do not constitute a contempt notwithstanding a contrary determination by the judge who issued the commitment.

Ex Parte Rowland, 104 U. S. 604. On the return of a rule to show cause why the writ of heabeas corpus should not be issued, it appeared that certain county commissioners had been adjudged in contempt by the circuit court for refusal to obey the commands expressed in a mandamus. The Court says at page 612:

> "If the command of the peremptory writ of mandamus was in all respects such as the circuit court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court. *Ex Parte Lange*, 18 Wall. 163; *Ex Parte Parks*, 93 U. S. 18; *Ex Parte Siebold*, 100 id. 371; *Ex Parte Virginia*, *id.* 339."

In Ex Parte Fisk, 113 U. S. 713 (1885), on an application for a writ of habeas corpus, it appeared that a suit had been brought against the petitioner in the New York State Court, an order for his examination before trial entered, the examination commenced but pending an adjournment he caused the action to be removed to the circuit

court where an order was made to continue the examination. The petitioner declined to be examined whereupon, on application for punishment for contempt, the contempt proceeding was adjourned and an order was entered directing the petitioner to appear before the master and be examined. Petitioner appeared but declined to be examined. Whereupon he was committed to the custody of the marshall against whom the writ applied for was sought to be directed. At page 718 the Court says:

> "The jurisdiction of this court is always challenged in cases of this general character, and often successfully. There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error, or appeal to this Court. Nor is there, in the system of federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power.
>
> "This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the original exercise of its duties, and to enable it to enforce its judgments, and orders necessary to the due administration of law, and protection of the rights of suitors.
>
> "When, however, a Court of the United States undertakes, by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is equally void. It is well settled

now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of habeas corpus, discharge the prisoner. It follows, necessarily, that on a suggestion by the prisoner, that, for the reason mentioned, the order under which he is held is void, this court will, in the language of the statute, make 'inquiry into the cause of restraint of liberty.' Sec. 752, Rev. Stat.

"That the case as made by the petitioner comes, for the purpose of this inquiry, within the jurisdiction of this court, under the principle above mentioned is established by the analogous cases: *Ex Parte Rowland*, 104 U. S. 604; *Ex Parte Lange*, 18 Wall. 163."

Ex Parte Irvine and Ex Parte Wagner, 74 Fed. Rep. 954 (1896), petitions for habeas corpus, where prisoners were committed for contempt before the circuit court for the southern district of Ohio, Western division, for refusing to answer certain questions when called and sworn as witnessess for the United States in the trial of an indictment against twelve defendants for conspiracy to commit an offense against the United States. On being asked certain questions on the stand the petitioners as witnesses declined to answer on the ground that it might tend to incriminate him. When the objection was first made the trial court said: "I will recognize that, as by answering that question you could not possibly criminate yourself." (p. 956.) (The court here explains to the witness the law on the subject.) Judge Taft, in his opinion, granting the writ, says (p. 959):

"The first question for consideration in this hearing is, how far this court may look beyond the commitment and its recitals into the evidence and circumstances upon which the committing court acted. It is and must be conceded that the court had full jurisdiction to try the indictment, to issue the subpoena which brought the witness to the stand, and to direct him to be sworn. It had jurisdiction over the defendants and over the cause. But the act of the court here complained of, while in the course of the trial of the indictment and of the defendants, concerned one who was not a party to the proceeding; and the jurisdiction of the court with reference to the witness is distinct from, though it grows out of, the jurisdiction to try the indictment. It is possible that the witness by a direct proceeding in error as from a criminal case, might have the validity of his sentence inquired into by an appellate court. Whether this be true or not, it is unnecessary to decide. It is clear that the decisions of the Supreme Court required this court to hold that, upon such a question as this, the testimony and facts upon which the court acted in committing the witness may and must be considered by the court before which the validity of the commitment is to be tested in a collateral way upon habeas corpus. In the Counselman Case, the whole proceeding, together with all the evidence given by the witness and the action of the court, was examined on habeas corpus. In the case of Ex Parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, the question was on habeas corpus to determine the validity of the commitment for contempt of a party defendant to an action removed to the federal court from the state court in New York, for his refusal

to answer a question put to him in a proceeding authorized by a statute of the state for the examination of defendants before a master prior to the trial. In that case the court held that the statutory procedure was not applicable to the federal court, and therefore that the court was without power to compel a witness to answer in such proceeding, and that the committment was void. In that case the entire proceeding before the circuit court was considered by the supreme court. The question whether the statute applied to the examination of witnesses in a federal court was a mere matter of procedure, which, with reference to the cause under consideration by the court, could not affect its jurisdiction. It had power to decide whether that procedure should be followed in the cause, and a judgment rendered by it in the cause would not have been void, even though reached by evidence obtained in accordance with the state statute: but when the statute was used as the basis for a commitment for contempt by a witness who declined to answer, its application to the federal practice did affect the power and jurisdiction of the court to commit the witness whose testimony was invoked under it. In the light of the Counselman Case, and the case of Ex Parte Fisk, the duty of this court to examine into and consider the facts upon which the trial court acted in commiting the petitioners cannot be doubted."

In this case it was held in effect that in deciding whether or not the answer to a question by a witness may tend to incriminate, with the view to punish him for contempt if he refuses to answer, is a decision that the trial court has jurisdiction and is reviewable on habeas corpus. The main

discussion in the opinion was as to whether the trial court was correct in holding that the answer would not criminate the witness and the conclusion that the trial court had erred in so holding was followed by the decision that the trial court was consequently without jurisdiction to punish the witness for contempt in declining to answer the question.

POINT THREE.

Application for the writ is properly made to this court.

The Statute provides: The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus. R. S. 751.

In *Ex Parte Terry*, 128 U. S. 289, it is said, at page 302:

> "In Sawyer's Case, 124 U. S. 200, this court entertained an original application for a writ of habeas corpus without requiring the petitioner to apply, in the first instance, to the proper Circuit Court; but, in that case, as in this, the application proceeded upon the ground that the Circuit Court itself had made the order by which he was alleged to have been deprived of his liberty in violation of the Constitution of the United States."

POINT FOUR.

The writ of habeas corpus should be issued.

New York, November 16th, 1918.

Respectfully submitted,

SPARKS, FULLER & STRICKER,
Attorneys for Petitioner,
44 Court Street,
Borough of Brooklyn,
City of New York.

JESSE FULLER, JR.,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

EX PARTE, IN THE MATTER OF THE APPLICATION OF WILLIAM F. HUDGINGS FOR LEAVE TO FILE A PETITION FOR A WRIT OF HABEAS CORPUS.

No. 27, Original.

SUGGESTIONS BY THE UNITED STATES TO THE COURT.

In reply to the preliminary brief filed with the petition for habeas corpus in the foregoing matter the following is respectfully submitted:

The matter which caused the commitment of petitioner occurred in the actual presence of the court, and, if constituting, under any circumstances, a contempt was strictly within the jurisdiction of the court.

It is not denied that a witness may, by the use of the words "I do not remember," or by qualifications needlessly repeated, "yield the jurisdictional fact essential to the power to punish for contempt." Petitioner's brief, p. 34.

While there are some authorities which hold that perjury cannot constitute a contempt, the weight of authority is to the effect that perjury may consti-

tute a contempt and may be punished by the court as such.

United States v. *Appel*, 211 Fed. 495.
In re Ulmer, 208 Fed. 461.
In re Steiner, 195 Fed. 299.
Berkson v. *People*, 154 Ill. 81.
In re Rosenberg, 90 Wis. 581.

This witness kept reiterating his manner of testifying despite several admonitions from the court.

The stenographic report shows this; but it does not show what the presiding judge had before him in determining this question—the demeanor of the witness towards the court; his manner of testifying.

In re Schulman, 177 Fed. 191, 193.

The discretion of the presiding judge is large in determining questions such as the instant case presents.

Mason v. *United States*, 244 U. S. 362, 366.

It is not to be supposed that an experienced judge would have lightly committed and held this petitioner.

The court recommended to the witness to consult counsel and proposed to take a recess so as to permit this. Petition, p. 18.

The witness declined to confer with counsel. Petition, p. 26.

Nowhere in the petition does it appear that he offered to make any disclaimer of a purpose to obstruct the court, or of disrespect.

Again, it does not appear that the petitioner has ever sought to purge the contempt, or has made

application to the court in this behalf. In this connection the attention of the Supreme Court is directed to a minute in this matter made by Judge Howe and ordered to be made a part of the record which shows that this has not been done.

While it appears that informal communications have passed between the judge and petitioner, it also appears that petitioner has been advised he would be heard in open court whenever he desired to purge himself of his contempt. A certified copy of such minute is submitted herewith.

It is proper to say that the Department of Justice had never had its attention brought to this matter until it learned informally that the writ was about to issue on this petition.

It is respectfully suggested that had the matter of discharge of this petitioner been formally presented to Judge Howe the release of petitioner doubtless would have been accomplished.

In thus presenting this matter to the court, counsel for the United States are not resisting the release of this petitioner, if the court deems that this matter is properly before it.

It is, however, deemed but justice to the district judge to bring to the attention of the court the points above stated.

ALEX. C. KING,
Solicitor General.

DECEMBER, 1918.

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